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8 RICHARD VIERRA, NATHANIEL WALKER

9
10 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
11 **SAN FRANCISCO DIVISION**
12

13 SHELLEY WATKINS,

Case No. 17-cv-06002-JCS

14 Plaintiffs,

15 v.

**DEFENDANTS CITY OF OAKLAND,
SABRINA LANDRETH'S, WILLIAM
BERGER'S, BRANDON HRAIZ'S,
BRENTON LOWE'S, CEDRIC REMO'S,
RICHARD VIERRA'S AND NATHANIEL
WALKER'S NOTICE OF MOTION AND
THEIR MOTION TO DISMISS
PLAINTIFF'S COMPLAINT
[Fed. R. Civ. Pro. 12(b)(6)]**

16 CITY OF OAKLAND; Oakland Police
17 Department Chief SABRINA LANDRETH, in
her Individual and Official Capacities; Oakland
18 Police Officer WILLIAM BERGER in his
individual capacity; Oakland Police Officer
19 BRANDON HRAIZ in his individual capacity;
Oakland Police Officer BRENTON LOWE in his
20 individual capacity; Oakland Police Officer
CEDRIC REMO, in his individual capacity;
21 Oakland Police Sergeant RICHARD VIERRA,
22 in his individual capacity; Oakland Police
Officer NATHANIEL WALKER in his
23 individual capacity; and DOES 1-30

**Date: January 26, 2018
Time: 9:30 a.m.
The Honorable Joseph C. Spero**

24 Defendants.
25
26

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on January 26, 2018 at 9:30 a.m., or as soon thereafter as the matter may be heard, in Courtroom G, in the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, 94102. Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants City of Oakland, Sabrina Landreth, William Berger, Brandon Hraiz, Brenton Lowe, Cedric Remo, Richard Vierra and Nathaniel Walker (collectively referred to as “Defendants”) shall and hereby move to dismiss all claims against them for failure to state a claim and request that the request for punitive damages be stricken from the complaint.

This Motion is based upon the Memorandum of Points and Authorities submitted herewith, the Request for Judicial Notice and corresponding exhibit, the Declaration of Michelle M. Meyers, and oral argument.

ISSUES TO BE DECIDED

1. Whether Plaintiff’s claim for violation of 42.U.S.C. § 1983 for depriving the Plaintiff of his constitutional right to be protected by unreasonable search and seizure should be dismissed pursuant to Federal Rules of Civil Procedure (“Fed. R. Civ. Pro.”) § 12(b)(6)? Plaintiff cannot state a claim as the Oakland Police Officers (“OPD”) Officers conduct was reasonable in light of the probable cause giving rise to Plaintiff’s arrest.

2. Whether Plaintiff’s *Monell* claim should be dismissed pursuant to Fed. R. Civ. Pro. § 12(b)(6)? Plaintiff’s *Monell* claim should be dismissed because unconstitutional acts of police officers cannot create *respondeat superior* liability under 42 U.S.C. § 1983. See *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 403 (1997).

3. Whether Plaintiff’s claim for violation of California Civil Code § 52.1 (“Bane Act”) should be dismissed pursuant to Fed. R. Civ. Pro. § 12(b)(6)? Plaintiff cannot allege any facts other

1 than a wrongful arrest and detention. Wrongful arrest and detention, without more, cannot
 2 constitute force, intimidation, or coercion for purposes of section 52.1. See *Shoyoye v. County of*
 3 *Los Angeles* 203 Cal.App.4th 947, 960 (2012).

4 4. Whether Plaintiff's claims for false arrest and false imprisonment should be
 5 dismissed pursuant to Fed. R. Civ. Pro. § 12(b)(6)? Plaintiff's claims are statutorily barred by
 6 California Penal Code § 847.

7 5. Whether Plaintiff's claims for assault and battery should be dismissed pursuant to
 8 Fed. R. Civ. Pro § 12(b)(6)? Plaintiff's claims should be dismissed because police officers acting
 9 in their official capacities may use reasonable force to make an arrest, prevent escape or overcome
 10 resistance, and need not desist in the face of resistance. See *P.A. v. United States*, C 10-2811 PSG,
 11 2013 WL 3864452, at *7 (N.D. Cal. July 24, 2013) (quoting *Munoz*, 120 Cal. App. 4th at 1102).

12 6. Whether Plaintiff's claim for negligence as to the City of Oakland should be
 13 dismissed pursuant to Fed. R. Civ. Pro § 12(b)(6)? Plaintiff's claim should be dismissed because a
 14 public entity is not liable for injury "[e]xcept as otherwise provided by statute . . ." See Cal. Govt.
 15 Code § 815(a).

16 7. Whether Plaintiff may proceed with his request for punitive damages? Plaintiff
 17 cannot allege facts which demonstrate that the Defendants acted with malicious, oppression or
 18 reckless disregard of Plaintiff's rights.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND FACTS

A. The Incident

On October 25, 2016, Plaintiff Shelley Watkins, also known as Jesse Powell, and a companion were drove from Sacramento to Oakland to attend bible study. (Request for Judicial Notice ("RJN") ¶ 1; Complaint ("Compl.") ¶¶ 2, 19, 20.) Before attending bible study, Plaintiff stopped to shop at the 99 Cent Only store located at 1440 Seventh Street, Oakland, California. (Compl. ¶ 20.) Plaintiff waited in the car while his friend shopped. (Compl. ¶ 21.) While sitting in the car, the Plaintiff asked a male in the parking lot if he had a light for Plaintiff's cigarette. (*Id.*) The person gave Plaintiff a book of matches. The Plaintiff then gave the person money so he could buy cigarettes. (*Id.*)

After Plaintiff's rejoined Plaintiff in his car, Mr. Watkins drove his vehicle out of the parking lot with the intent of going to bible study. (Comp. ¶ 23.)

B. The Detention and Arrest

Plaintiff admits in detail the manner in which OPD detained and arrested him. First, the Officers requested he put his keys onto the dashboard of the vehicle. Plaintiff complied. (Compl. ¶ 25.) Next, Officer Hraiz instructed him to set out of the car and place his hands behind his back. Plaintiff complied. (Compl. ¶ 26.) Thereafter, Officer Hraiz placed handcuffs on Plaintiff. (*Id.*) Thereafter, Officer Hraiz requested Plaintiff walk and stand next to the OPD vehicle. Plaintiff complied. (Compl. 27.) Officer Hraiz conducted a search of Plaintiff and then placed Plaintiff into the OPD vehicle. (*Id.*)

Officer Hraiz told Plaintiff that he was being arrested because he had engaged in the sale of narcotics. (Compl. 29.) Plaintiff admits OPD grounds for probable cause to arrest him:

In a police report, Defendant REMO stated that he had a "clear and unobstructed view of WATKINS from approximately 20 feet away" and that the "surveillance was conducted during daylight hours, so there was plenty of sunlight." Defendant REMO claimed that he observed a black male, Keith Williams, approach Plaintiff, and that Plaintiff exited his

vehicle. Defendant REMO fabricated that he observed the two engage in a brief conversation and that Williams had currency in his right hand. Defendant REMO falsely stated that he observed Plaintiff reach into his right front jean pocket and pull a small folded piece of paper and give it to Williams in exchange for U.S. currency. Defendants ROWE, WALKER, and LOWE all falsely claimed they observed Plaintiff and Williams engage in a narcotics sale.

(Compl. ¶ 31.)

C. Subsequent Action

The Alameda County District Attorney charged Plaintiff with violation of Health and Safety Code § 11379(a), Sale of Controlled Substance. (Compl. ¶ 35.) Plaintiff posted a \$30,000 bond. (Compl. ¶ 34.) After four court appearances, on April 3, 2017, the District Attorney dismissed the charge against Plaintiff. (Compl. ¶ 36.)

II. PROCEDURAL POSTURE

On April 11, 2017, Plaintiff submitted a Government Tort Claim to the City. (Compl. ¶ 13.) The City denied the Government Tort Claim on April 20, 2017. (Compl. ¶ 13.) Plaintiff filed this lawsuit on October 19, 2017.

III. LEGAL STANDARD

A Rule 12(b)(6) motion is similar to the common law general demurrer—i.e., it tests the legal sufficiency of the claim or claims stated in the complaint. *Strom v. United States* (9th Cir. 2011) 641 F.3d 1051, 1067; *SEC v. Cross Fin'l Services, Inc.* 908 F.Supp. 718, 726-727 (CD CA 1995) (quoting text); *Beliveau v. Caras* 873 F.Supp. 1393, 1395 (CD CA 1995) (citing text); *United States v. White* 893 F.Supp. 1423, 1428 (CD CA 1995).

A matter should be dismissed where the complaint “lacks a cognizable legal theory” or the “absence of sufficient facts alleged under a cognizable legal theory.” *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). Plaintiff must allege a “causal connection between the defendant’s actions and the harm that results.” *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-87 (1977).

1 In order to defeat a motion premised upon Federal Rule of Civil Procedure 12(b)(6),
 2 Plaintiff must plead facts sufficient to state a claim for relief that is plausible on its face. *Bell*
 3 *Atlantic Corp. v. Twombly* 550 U.S. 544 (2007). Although the Court must accept the factual
 4 allegations as true for purposes of this motion, the Court “is not bound to accept as true a legal
 5 conclusion as a factual allegation. *Ashcroft v. Iqbal* 556 U.S. 662, 678 (2009).

6 IV. FEDERAL CLAIMS

7 A. Plaintiff Cannot State a Claim for 28 U.S.C. § 1983

8 Plaintiff’s first claim is for violation of 28 U.S.C. § 1183 which provides that Plaintiff may
 9 recover for the deprivation of any rights, privileges, or immunities secured by the Constitution and
 10 laws of the United States. Plaintiff contends that the individual Defendants actions were in
 11 violation of the Fourth and Fourteenth Amendments. Plaintiff must establish two elements: (1) the
 12 right secured by the Constitution or laws of the United States was violated; and (2) that the alleged
 13 violation was committed by a person acting under the color of state. *West v. Atkins* (1998) 487 U.S.
 14 42, 48. The application of the Fourth Amendment requires that the Court employ a reasonableness
 15 standard. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 921 (9th Cir. 2001).

16 Assuming the allegations true, the Officers conduct was reasonable. Here, after witnessing
 17 exchange of money for what appeared to be a paper containing drugs to the Officers, the Officers
 18 detained and arrested Plaintiff. Plaintiff contends that it was not drugs, but rather was a book of
 19 matches. As such, the Officers’ mistake does not constitute a violation of the Fourth
 20 Amendment.

21 B. Plaintiff’s Monell Claim is Likewise Barred

22 A public entity liability arises under 42 U.S.C. § 1983, if its “policy, custom, whether made
 23 by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy”
 24 cause a constitutional violation. *Monell v. Department of Social Services*¹, 436 U.S. 658, 694

25 _____
 26 ¹ The holding of the *Monell v. Department of Social Services* case is commonly referred to as
 “Monell”.

(1978). Unconstitutional acts of police officers cannot create *respondeat superior* liability under 42 U.S.C. § 1983. *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 403 (1997).

Assuming *arguendo* that the City had an unlawful practice or policy, a *Monell* claim cannot be stated against the City without first establishing an underlying claim of a constitutional violation by an officer pursuant to that policy or practice. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986.) For the reasons, discussed above with regard to 28 U.S.C. § 1983, Plaintiff cannot state a claim against the City and/or Defendant Landreth.

C. Qualified Immunities

1. The Officers' Alleged Conduct Is Subject to Protection by Qualified Immunities

Plaintiff cannot state a claim against the individual Officers as their alleged actions are protected by qualified immunity.²³ Qualified immunity is a powerful tool that shields individual officials who are performing discretionary activities unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *See also, Anderson v. Creighton*, 483 U.S. 635 (1987). A government official is entitled to qualified immunity unless his "act is so obviously wrong, in the light of preexisting law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing." *Lassiter v. Alabama A & M University Board of Trustees*, 28 F.3d 1146 (11th Cir. 1994). Qualified immunity applies "if an reasonable officer could have believed that probable cause existed to arrest." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

²³Courts should not assume that the plaintiff states a constitutional claim simply to get to the qualified immunity issue. *Siebert v. Gilley*, 500 U.S. 226, 232 (1991)

³ A defendant official may assert the qualified immunity defense in 12(b)(6) motion for failure to state a claim. *United States v. Gaubert*, 499 US 315, 324-325(1991); *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). Courts should resolve questions of qualified immunity at the earliest possible stage in litigation. *Pearson v. Callahan*, 555 U.S. 223, 232 citing *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

Here, Plaintiff contends OPD misunderstood what they observed. However, Plaintiff cannot allege that the OPD was unreasonable. OPD had a clear view of what appeared to be a drug sale and as such, Plaintiff's arrest was reasonable and thus subject to immunity.

2. When an Officer is Immune, the City is also Immune

Where the official is immune, so is his municipal employer. Gov't. Code § 815.2(b). Accordingly, Plaintiff's claims against the City should likewise be dismissed since he cannot maintain claims against the individual Defendants.

V. CALIFORNIA STATE LAW CLAIMS

A. Plaintiff Fails To State a Claim for Violation of Civil Code § 52.1 ("Bane Act")

Civil Code section 52.1 provides in part:

"(a) If a person or persons, whether or not acting under color of law, interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured.... [¶] (b) Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages...." (Italics added.)

To prevail on a cause of action under Civil Code section 52.1, the plaintiff must show that the defendant interfered with or attempted to interfere with the plaintiff's legal right by threatening or committing violent acts. *Doe v. State* 8 Cal. App. 5th 832, 842–43 (2017) citing *Austin B. v. Escondido Union School District* 149 Cal.App.4th 860, 881-882 (2007); see generally *Jones v. Kmart Corp.* 17 Cal.4th 329, 334 (1998).) Coercion inherent in the alleged constitutional violation, i.e., an overdetention in jail, is insufficient to meet the statutory requirement of " 'threat, intimidation, or coercion.' " *Shoyoye v. County of Los Angeles* 203 Cal.App.4th 947, 959 (2012).

The statute requires a showing of threatening conduct independent from the alleged

1 interference or violation of a civil right. (*Ibid.*; see also *Allen v. City of Sacramento* 234
 2 Cal.App.4th 41, 66 (2015) [“There are two distinct elements for a [Civil Code] section 52.1 cause
 3 of action.”].) “ ‘[A] wrongful arrest and detention, without more, cannot constitute “force,
 4 intimidation, or coercion” for purposes of section 52.1.’ ”(*Shoyoye*, 203 Cal. App. 4th at 960.)

5 Here, Plaintiff contends that he was wrongfully arrested and detained. He does not (and
 6 cannot) allege excessive force, intimidation or coercion outside of his arrest. The case law is clear
 7 that a wrongful arrest alone is insufficient to establish a claim for violation of Civil Code section
 8 52.1. As such, Defendants respectfully request that the claim be dismissed.

9 **B. Plaintiff's Claims for False Arrest and False Imprisonment are Statutorily**
 10 **Barred**

11 Plaintiff alleges that the Defendants are liable for False Arrest (Claim No. 4) and False
 12 Imprisonment (Claim No. 5).⁴ However, such claims are statutorily barred by Penal Code § 847
 13 which states:

- 14 (a) A private person who has arrested another for the commission of a public offense
 15 must, without unnecessary delay, take the person arrested before a magistrate, or
 16 deliver him or her to a peace officer.
- 17 (b) There shall be no civil liability on the part of, and no cause of action shall arise
 18 against, any peace officer or federal criminal investigator or law enforcement officer
 19 described in subdivision (a) or (d) of Section 830.8, acting within the scope of his or
 20 her authority, for false arrest or false imprisonment arising out of any arrest under
 21 any of the following circumstances:
- 22 (1) The arrest was lawful, or the peace officer, at the time of the arrest, had
 23 reasonable cause to believe the arrest was lawful.
- 24 (2) The arrest was made pursuant to a charge made, upon reasonable cause, of
 25 the commission of a felony by the person to be arrested.
- 26 (3) The arrest was made pursuant to the requirements of Section 142, 837, 838,
 or 839.

⁴ Under California law, “false arrest is not a different tort” but “is merely one way of committing a
 false imprisonment.” *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir.
 2001) citing *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1379 (9th Cir.1998) (citation and
 quotation omitted); see also *Asgari v. City of Los Angeles*, 15 Cal.4th 744, n. 3 (1997).

1 Cal. Pen. Code § 847.

2 An arrest is considered “lawful” if it was supported by probable cause at the time it was
3 executed. *Goehring v. Wright*, 858 F. Supp. 989, 1003 (N.D. Cal. 1994) citing *Hamilton v. City of*
4 *San Diego*, 217 Cal.App.3d 838, 266 Cal.Rptr. 215, 218–219 (1990).

5 ““Probable cause for an arrest is shown if a [person] of ordinary caution or prudence would
6 be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused.
7 Probable cause may exist even though there may be room for some doubt.... The test in such
8 a case is not whether the evidence upon which the officer made the arrest is sufficient to
convict but only whether the prisoner should stand trial.””

9 *Goehring v. Wright*, 858 F. Supp. 989, 1003 (N.D. Cal. 1994) citing *Hamilton v. City of San Diego*,
10 217 Cal.App.3d 838, 266 Cal.Rptr. 215, 219 (1990) quoting *People v. Fischer*, 49 Cal.2d 442, 446,
11 317 P.2d 967 (1957).

12 Plaintiff admits that OPD Officer Hraiz told him that he was being arrested for the sale of
13 narcotics. (Compl. ¶ 29.) Plaintiff concedes that OPD arrest was based upon probable cause, which
14 resulted from OPD Officers, observing the Plaintiff engage in the sale of narcotics. (Compl. ¶ 31.)
15 OPD Officers observed the drug transaction from approximately 20 feet and their view was “clear
16 and unobstructed.” (*Id.*)

17 As such, the Officers observed what they believed to be a drug transaction which provided
18 probable cause for the arrest of Plaintiff. Accordingly, the Officers and the City cannot be liable for
19 false arrest and false imprisonment. (See Pen. Code § 847; Gov’t. Code §815.2.)

20 **C. Plaintiff’s Claims for Assault and Battery Should be Dismissed**

21 Plaintiff seventh claim is for both assault and battery. Plaintiff does not allege a statutorily
22 provision which he is relying upon; therefore, Defendants presume he is relying upon Penal Code §
23 242 which defines battery as “any willful and unlawful use of force or violence upon the person of
24 another.” In order to prevail on a claim for battery against a police officer, the plaintiff must
25 provide that officer used unreasonable force. *Hernandez v. Cnty. of Marin*, 11-CV-03085-JST,
26

1 2013 WL 4525640, at *8 (N.D. Cal. Aug. 19, 2013) (quoting *Munoz v. City of Union City*, 120
 2 Cal. App. 4th 1077, 1102 (2004)). Police officers acting in their official capacities may use
 3 reasonable force to make an arrest, prevent escape or overcome resistance, and need not desist in
 4 the face of resistance. See *P.A. v. United States*, C 10-2811 PSG, 2013 WL 3864452, at *7 (N.D.
 5 Cal. July 24, 2013) (quoting *Munoz*, 120 Cal. App. 4th at 1102).

6 Plaintiff in his complaint dedicates several paragraphs describing his arrest and detention.
 7 Plaintiff does not allege that the Officers used “unreasonable force” in his arrest. Plaintiff admits
 8 that he complied with all the Officers verbal requests and that he was handcuffed without the use of
 9 any force. As such, the Court should dismiss Plaintiff’s seventh claim.

10 **D. Plaintiff’s Eighth Claim for Negligence Should Be Dismissed as to the City**

11 Plaintiff seeks to recover in his eighth claim against all Defendants for negligence. Under
 12 the California Tort Claims Act, a public entity is not liable for injury “[e]xcept as otherwise
 13 provided by statute . . .” CAL GOVT. CODE § 815(a). All common law or judicially declared forms
 14 of liability for public entities have been abolished and public entity liability is wholly dependent on
 15 statute. See *In re Ground Water Cases*, 154 Cal.App.4th 659, 688 (2007).

16 “[T]he intent of the [California Tort Claims Act] is not to expand the right of plaintiffs in
 17 suits against governmental entities, but to confine potential governmental liability to rigidly
 18 delineated circumstances: immunity is waived only if the various requirements of the act are
 19 satisfied.” *Id.* (quoting *Williams v. Horvath*, 16 Cal.3d 834, 838 (1976)). “Sovereign immunity is
 20 the rule in California.” *In re Ground Water Cases*, 154 Cal.App.4th at 688 (citing *Sonoma AG Art v.*
 21 *Department of Food & Agriculture*, 125 Cal.App.4th 122, 125 (2004)). “Consequently, the public
 22 entity defendant may be held liable *only* if there is a statute subjecting them to civil liability.” *Id.*
 23 (emphasis in original). “In the absence of such a statute, a public entity’s sovereign immunity bars
 24 the suit.” *In re Ground Water Cases*, 154 Cal.App.4th at 688 (citing *Gates v. Superior Court*, 32
 25 Cal.App.4th 481, 509 (1995)); see also *Keyes v. Santa Clara Valley Water District*, 128 Cal.App.3d
 26

1 882, 885-86 (1982). The City of Oakland is a public entity for the purposes of the California Tort
 2 Claims Act. *See* CAL GOVT. CODE § 811.2. (“ ‘Public entity’ includes the State, the Regents of the
 3 University of California, a county, city, district, public authority, public agency, and any other
 4 political subdivision or public corporation in the State.”). Accordingly, the City cannot be held
 5 liable in this case in the absence of an authorizing statute or enactment.

6 Here, Plaintiff failed to identify any statutory authority that subjects the City to liability on a
 7 negligence claim. The failure to provide statutory authority is fatal to the claim for negligence
 8 against the City.

9 VI. PUNITIVE DAMAGES

10 A. Plaintiffs Claim for an Award of Punitive Damages against the City must be 11 dismissed because Public Entities are Exempt from Liability for Punitive Damages.

12 Plaintiff seeks to recover punitive damages against the individual Defendants.⁵ Plaintiff’s complaint,
 13 however, is devoid of factual admissions warranting an award of punitive damages. The United
 14 States Courts for the Ninth Circuit provided the following Comment to Model Civil Jury Instruction
 15 5.5 entitled Punitive Damages:

16
 17 As to § 1983 claims, “[i]t is well-established that a ‘jury may award punitive damages . . .
 18 either when a defendant’s conduct was driven by evil motive or intent, or when it involved a
 19 reckless or callous indifference to the constitutional rights of others.’” *Morgan v. Woessner*,
 20 997 F.2d 1244, 1255 (9th Cir.1993). In *Dang v. Cross*, the Ninth Circuit held this “statement
 21 of the law of punitive damages is incomplete, however. The standard for punitive damages
 22 under § 1983 mirrors the standard for punitive damages under common law tort cases. . . .
 23 [M]alicious, wanton, or oppressive acts or omissions are within the boundaries of traditional
 tort standards for assessing punitive damages and foster ‘deterrence and punishment over
 and above that provided by compensatory awards.’ . . . Such acts are therefore all proper
 predicates for punitive damages under § 1983.” 422 F.3d 800, 807 (9th Cir.2005) (citing
Smith v. Wade, 416 U.S. 30, 49 (1983)). The *Dang* court held it was reversible error to
 decline to instruct that “oppressive acts” were an alternative basis for punitive damages in a
 § 1983 case.

24
 25 ⁵ Defendants move to strike punitive damages pursuant to Rule 12(b)(6). *See Whittlestone v.*
 26 *Handi-Craft Company*, 618 F.3d 970, 974-975 (9th Cir. 2010) (concluding challenge to damages
 claim is really an attempt to have portions of complaint dismissed and is better suited to Rule
 12(b)(6) motion to dismiss).

1 Similarly, punitive damages claims arising under state law are subject to state law standards
2 for recovery which should be reflected in a modified jury instruction. *See, e.g., Coughlin v.*
3 *Tailhook Ass'n*, 112 F.3d 1052, 1056 (9th Cir.1997).

4 Model Civil Jury Instruction 5.5, Punitive Damages, Comment.

5 Plaintiff's complaint includes 84 paragraphs. In his lengthy complaint, Plaintiff concedes
6 that his detention and arrest was based upon the Officers purported observation of him selling
7 narcotics. An arrest following the observation of illegal activity, does not rise to the level of evil
8 required to justify an award of punitive damages. As such, Plaintiff's demand for punitive damages
9 should be dismissed.

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VII. CONCLUSION

For the foregoing reasons, Defendants request that the Court dismiss Plaintiff's claims as to all Defendants for:

- 42 U.S.C. § 1983;
- Bane Act;
- False Arrest and False Imprisonment; and
- Assault and Battery.

For the foregoing reasons, Defendant Landreth and the City request that Plaintiff's Monell claim be dismissed. Lastly, the City requests that the claim for negligence be dismissed as to the City.

Dated: December 12, 2017

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